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The Doctrine of Advancements

M. DONALD WRIGHT, JR.*

I. INTRODUCTION AND HISTORY

The history of the doctrine of advancements is uncertain. Writers are unable to precisely trace its origin.¹ However, Blackstone lends some inkling as to the possible sources in the following statement:

“This just and equitable provision hath been also said to be derived from the *collatio bonorum* [comingling of property for the purpose of equal division] of the imperial law: which it certainly resembles in some points through it differs in others. But it may not be amiss to observe that with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and our sister kingdom of Scotland: and with regard to lands descending in coparceny; that it hath always been and still is, the common law of England, under the name of ‘hotchpot’.”²

The earliest legislation that positively includes the doctrine of advancements as a part of the law of intestate succession is the English Statute of Distributions,³ and it is believed by scholars that this provision was derived from the *collatio bonarum* as indicated by Blackstone. The idea of this segment of the Roman law was that an emancipated son or daughter, who had previously received a dowry, could claim a child's share in its father's estate provided that the son account for all the property he had accumulated and the daughter account for her dowry.⁴ Whatever may be its source and derivation, advancement has presented a theme upon which legislation has been enacted in almost every jurisdiction in this country.

II. DEFINITION

The concept of advancements being purely statutory in its origin, any definition of the doctrine must depend upon legislation for its

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¹ Elbert, *Advancements*, 51 MICH. L. REV. 665 (1953).

² 2 BLACKSTONE, COMMENTARIES *517.

³ 22 & 23 Car. II, c. 10 (1670).

⁴ BUCKLAND, PRIVATE ROMAN LAW 198 (2d ed. 1939).

force as a legal doctrine, and thus the term is incapable of a precise universal definition. Typical of the definitions propounded by the courts is that advanced by the Illinois court in *Grattin v. Grattin*,⁵ when the term was defined as “. . . the giving by the intestate in his lifetime, by anticipation, the whole or part of what it is supposed the donee will be entitled to on the death of the person making it.”⁶ West Virginia has no statute which defines the term “advancement,” but the West Virginia court has stated the applicable law as follows: “By the word advancement . . . is meant a gift by a parent to a child or descendant for the purpose of advancing him in life”⁷ A modern case defines the term in this more complete fashion:

“An advancement is an irrevocable gift made by a parent or ancestor, during the lifetime of either, to one standing in the place of a prospective heir or distributee, with the intention on the part of the donor that such gift shall represent a part or the whole of the share of his estate to which the donee would become entitled on the death of the donor intestate.”⁸

The basic assumption of the doctrine is that the law of intestate succession has, as its function, the making of a distribution conformable to the desires of the decedent, and as a corollary to this function that a normal decedent wishes to treat his offspring with equality.⁹ Thus it follows that when the parent makes a distribution during his lifetime to his child, this is considered as having been made in anticipation of the intestate share which the child would receive on the death of the ancestor. Such advances to the child must then be taken into consideration in the final intestate distribution in order to preserve the assumed intended equality.

There are areas where various jurisdictions are not in accord as to the particulars of the doctrine. These areas concern mainly (a) the role of intent in relation to advancements; (b) the persons who may make and who are chargeable with advancements; (c) the type of transaction which constitutes an advancement; (d)

⁵ 18 Ill. (8 Peck) 167 (1856).

⁶ *Accord, Darne's Ex'r v. Lloyd*, 82 Va. 859, 5 S.E. 87 (1887).

⁷ *Waldron v. Taylor*, 52 W. Va. 284, 45 S.E. 336 (1903). Note that this definition is confined to children and descendants and on the basis of this decision, the legislature has added to the statute the term “collateral relatives.”

⁸ *Hedrick v. Harper*, 135 W. Va. 47, 57, 62 S.E.2d 265, 269 (1950).

⁹ See *Grattan v. Grattan*, 18 Ill. (8 Peck) 167 (1856); *Novels v. Davenport*, 183 N.C. 207, 111 S.E. 180 (1922).

transactions which are not considered to be advancements; (e) the function of certain stated presumptions; and (f) the application of the doctrine to cases of partial intestacy on the part of the advantor. These facets will be considered, with particular emphasis placed on the local problems, in the order in which they have been enumerated.

III. THE FUNCTION OF INTENTION

In a majority of jurisdictions, the rule is that the intent of the advantor at the time of the transaction is determinative in ascertaining whether a transfer is or is not an advancement.¹⁰ West Virginia is in accord with this view, the court stating that where, in the distribution of the estate of an intestate father, it is claimed that title to certain property was conferred to his children by way of advancement, the solution to the problem depends upon the intention of the father in disposing of the property, which intent is ascertained from the evidence and the surrounding circumstances.¹¹

The concern for intent here is apparently a corollary to the general principle that a person has a right to dispose of his property as he pleases. If a person intends to advance a portion of his estate to one who would otherwise succeed to it at his death, the usual view is that such intent should resolve the issue.¹² The case of *McClanahan v. McClanahan*,¹³ one of the leading West Virginia cases, quotes at length from the Virginia case of *Watkins v. Young*¹⁴ to the effect that an unexplained gift from a father to one of his children, the father later dying intestate, is presumed to be an advancement. The court said:

"In some of the states it is held that a gift of any considerable amount is prima facie an advancement, and is to be treated, in case the party to whom the advancement was made comes in for a distributive share, as a debt due from him to the estate. [Citations omitted] In other states it has been held that a mere gift, unexplained, by father to child, does not make even a prima facie case in favor of an advancement,

¹⁰ *E.g.*, *Barron v. Barron*, 181 Ga. 505, 182 S.E. 851 (1935); *McCabe v. Broome*, 107 Md. 490, 69 Atl. 259 (1908); *Rowe v. Rowe*, 144 Va. 816, 130 S.E. 771 (1925).

¹¹ *McClanahan v. McClanahan*, 36 W. Va. 34, 14 S.E. 419 (1892); *Roberts v. Coleman*, 37 W. Va. 143, 16 S.E. 482 (1892).

¹² *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665 (1920).

¹³ 36 W. Va. 34, 14 S.E. 419 (1892).

¹⁴ 72 Va. (31 Gratt.) 84 (1878).

but that there must be some evidence of intention to treat it as an advancement beyond the unexplained act. [Citations omitted]

"But, whatever conflict may seem to exist on this question, all the cases agree that a gift in the lifetime of the intestate, unexplained, is only a presumption in favor of an advancement, and makes only a prima facie case which may be rebutted by the evidence."¹⁵

Upon this information, the court in the *McClanahan* case decided that the question of whether there was an advancement depended upon the intent of the advancer.¹⁶ Thus it would appear that the West Virginia court has adopted the intent theory.

More difficult is the question of the scope of inquiry to be made in determining this intent. The *McClanahan* case states that intent is to be ascertained from the evidence and the surrounding circumstances, but the syllabus of the case adds to this statement, and says that the circumstances are "... the value of his entire estate, the number of his children, etc."¹⁷ Text-writers list various elements which may be admitted in order to adduce the intent of the intestate. Atkinson makes the following statement concerning the problem:

"Of course the determination of the subjective intent of a deceased person is not an easy matter. Express declarations of the parent are admissible for the purpose of discovering his intent, as are his books of account. The surrounding circumstances may also be considered. The extent of the property given is a pertinent factor"¹⁸

West Virginia law has followed the *McClanahan* case although this appears to be the only statement by the court as to what constitutes surrounding circumstances. Parol testimony is admitted to explain such circumstances,¹⁹ and direct statements of the parent as to his intent, whether made at the time of the gift or subsequently are admitted on this issue.²⁰ It would thus appear that the courts

¹⁵ *Id.*, at 88.

¹⁶ *Id.*, at 45.

¹⁷ *Ibid.*

¹⁸ ATKINSON, WILLS § 129 (2d ed. 1953).

¹⁹ *McClanahan v. McClanahan*, 36 W. Va. 34, 14 S.E. 419 (1892).

²⁰ *Gaylord v. Hope Natural Gas Co.*, 122 W. Va. 205, 8 S.E.2d 189 (1940).

in both Virginia and West Virginia liberally allow any evidence to be introduced which will have some relevancy as to the subjective intent of the advancor at the time he made the gift.²¹

IV. PARTIES TO THE TRANSACTION

Various statutes impose different limitations on the persons who may make and who are chargeable with advancements. The doctrine of advancements in its most common application concerns the transaction between parent and child, but it is not limited in its scope to such persons. As to such gifts it is interesting to note that in the early development of the concept of advancements the courts were faced with the difficulty of determining whether a transfer from a mother to a child was an advancement. An English court²² pointed out that the doctrine was intended for persons engaged in trade, and since women were not so engaged they were incapable of making an advancement. This remained the law of England until the Administration of Estates Act of 1925 made the doctrine applicable to "all deceased persons, male or female."²³

When the original rationale of the doctrine is reconsidered, it will be remembered that the general concept of advancements was to create equality between the children of an intestate parent.²⁴ Some American statutes adhere to this viewpoint and require that the advancor and the advancee be parent and child,²⁵ but even in this instance, the courts, in construing the word "child" have given to the doctrine more liberal interpretation than was probably originally intended. For example, the Supreme Court of Georgia, construing a statute which followed the parent-child concept of advancements, stated that the advancor's intention was the controlling factor, and that since he had intended a gift to his son-in-law to be such, it would be treated by the court as an advancement to the daughter.²⁶ This is a prime example of how courts have liberalized the historical doctrine, while other jurisdictions, including both Vir-

²¹ *E.g.*, *Rowe v. Rowe*, 144 Va. 816, 130 S.E. 771 (1925); (dependance of infant on father); *Lam v. Brock*, 92 Va. 173, 23 S.E. 224 (1895) (similarity of gifts to others); *Neil v. Flynn Lumbert Co.*, 82 W. Va. 24, 95 S.E. 523 (1918) (failure of child to claim further participation).

²² *Holt v. Gredrick*, 2 P. Wms. 356, 24 Eng. Rep. 763 (1726).

²³ 15 Geo. 5, c. 23, § 471 (1925).

²⁴ See note 9, *supra*.

²⁵ *E.g.*, GA. CODE ANN. § 113-1013 (1955).

²⁶ *Ireland v. Dyer*, 133 Ga. 851, 67 S.E. 195 (1910).

ginia and West Virginia, have liberalized the doctrine by legislative enactment.

The West Virginia statute states that the concepts of the doctrine of advancements are applicable to “. . . any descendant or collateral relative of a person dying intestate. . . .”²⁷ This section has not always included the term “collateral relative” and originally applied only to “descendants.” The case of *Waldron v. Taylor*²⁸ discussed the persons who were to be encompassed by the applicable statute, and found that the 1819 Virginia Code used the term “children” as indicative of the common law scope of advancements. The court further found that in the Virginia Code of 1849, a broader and more comprehensive term “descendant” was used. The court deduced that the reason for this change in terminology was that the legislature deemed “children” not broad enough to cover the indiscriminate interchange of the words “children” and “issue.” The court then found that the term “descendant” included only lineal descendants of the intestate, excluding collateral relations. In refusing in this case to apply the doctrine to a collateral relative²⁹ of the intestate, the court said that if the legislature had intended to include all heirs at law of the intestate, it should have been so expressed. The legislature obviously did not desire to limit the doctrine within this decision and changed the statute to read as it now does. Thus it can be seen that this state has taken an extremely broad view of the original concept of the doctrine of advancements.

It should be noted, however, that since legislation is designed to reflect the policies of the people, and since the doctrine of advancements rests on the desired social policy that a father dying intestate wishes to treat his children with equality, and by its very terminology the concept is viewed as one whereby a father established or advances his children in life, there can be little reason for including within the doctrine collateral relatives. A person does not always have the same degree of affection for each of his collaterals, nor does he with regularity make a gift for the purpose of establishing a collateral relative in life, so in actuality, there is no need to include collaterals within the doctrine.³⁰

²⁷ W. VA. CODE, ch. 42, art. 4 § 1 (Michie 1955).

²⁸ 52 W. Va. 284, 45 S.E. 336 (1902).

²⁹ In this instance, it was a sister.

³⁰ Elbert, *Advancements*, 51 MICH. L. REV. 665, 694 (1953).

V. THE ADVANCEMENT TRANSACTION

A. Those Which Constitute Advancements

An advancement may include real³¹ or personal³² property or both. Statutes in a great majority of jurisdictions, including Virginia³³ and West Virginia³⁴ so provide. Both the Virginia and West Virginia codes include “. . . any estate, real or personal . . .” of a person dying intestate. Any other rule would defeat the equality concept upon which the doctrine of advancements is based.

An interesting situation arises where a parent takes out a policy of insurance on his life and names one of his children as the beneficiary. When the insured dies intestate, the other children may present the argument that the proceeds of the insurance are an advancement, and courts of various jurisdictions have so held, charging the child with the value of the policies as an advancement.³⁵ Arguments against this contention, especially in the situation where the settlor has the right in the policy to change the beneficiary, have been based on the statement that an advancement must be made in the lifetime of the advantor. However, applying by analogy the situation where the settlor has the power to revoke a trust which he has created, and dies without doing so, the beneficiary being required to account for the proceeds under the doctrine of advancements,³⁶ it would seem to reasonably follow that an insurance policy should constitute an advancement.³⁷

Courts have held that the use of the parent's land by a child without the payment of rent therefor is not an advancement to the child on the death of the parent intestate. The Virginia court³⁸ stated that this was not to be considered as an advancement because “. . . the possession and use of the land . . . , being permissive and precarious, could not be considered as an advancement made towards their [the children's] permanent establishment in life, nor could they have converted such a right as they held into

³¹ *McClintock v. Loisseau*, 31 W. Va. 865, 8 S.E. 612 (1888).

³² *Watkins v. Young*, 72 Va. (31 Gratt.) 84, (1878).

³³ VA. CODE § 64-17 (1950).

³⁴ W. VA. CODE, ch. 42, art. 4 § 1 (Michie 1955).

³⁵ *E.g. Culberhouse v. Culberhouse*, 68 Ark. 405, 68 S.W. 38 (1900); *Thompson v. Latimer*, 209 Ky. 491, 273 S.W. 65 (1925).

³⁶ *Hughey v. Eichelberger*, 11 S.C. 36 (1878).

³⁷ 6 POWELL, REAL PROPERTY § 1009 (1958).

³⁸ *Christian v. Coleman*, 30 Va. (3 Leigh) 30 (1831).

money to be applied for that purpose." However, where the child is permitted by the father to rent out the land and to receive the rents for his or her use, after having had the use of the land without being required to pay rental to the parent, the rents so received are considered as advancements.³⁹

In the instance where a parent makes a gift of land to a child without giving him a deed therefor, it is possible for a dispute to arise as to whether this land is to be considered as part of the estate of the intestate or as an advancement to the child. The issue is determined by the application of the doctrine of statute of frauds to the situation. If the child has made improvements sufficient to withdraw the transaction from the application of the statute, then the gift is an advancement,⁴⁰ otherwise, it is treated as a parol gift of land and is included in the estate of the parent.⁴¹

In relation to these situations it is possible to have a transaction whereby a father makes a parol gift of land to one of his children, who makes improvements, but insufficient to take the transaction from the statute of frauds, and who then rents the land based on the improvements he has made. The Virginia court was presented with this situation in *Chinn v. Murray*,⁴² and the court there held that in bringing the land into "hotchpot" (in order to share in the estate of his father) the child did not have to account for the improvements or the increases that he had made to the property while in his possession. The theory advanced was that since he would be held liable for any *loss* sustained in the value of the land, that he should have the benefit of any *increases* in the value. The court also stated that in the accounting for rents and profits, the estimate thereof should not be based on the improvements made on the land, inferring from this that the advanced property should be valued for the purposes of determining the requisite shares in the estate at the time the advancee received the property, and not at the time of the death of the advantor. But the court refused to decide this point.⁴³

³⁹ *Williams v. Stonestreet*, 24 Va. (3 Rand.) 559 (1825).

⁴⁰ *Nicholas v. Nicholas*, 100 Va. 660, 42 S.E. 669 (1902).

⁴¹ *Dugan v. Gittings*, 3 Gill. 138 (Md. 1845).

⁴² 45 Va. (4 Gratt.) 348 (1848).

⁴³ Syllabus Point 4 states as follows: "*Quaere*: If the advancement is to be valued at the time of the advancement, or at the death of the father?"

B. Valuation of Advanced Property

From this statement arises the problem as to the valuation to be placed on the advanced property in determining the child's share of the estate. The general statement of law on this subject is that an advancement is to be accounted for at its value when made,⁴⁴ or if there is a time lapse between the time when made by the advancer and when received by the advancee (as a gift where possession and enjoyment do not come about until some future time), then the gift is to be valued at the date when it is received.⁴⁵ The reason for this rule, and the reason for not computing the value of the advanced property at the time of the death of the intestate, is that the gift is complete when made, being the property of the advancee from the time he receives it. Therefore, to value the property as of another date may be unjust to the advancee and the other heirs. If the advancee, through improvident care and use of the property, causes it to deteriorate or be destroyed, it becomes his loss, and also, the other heirs are not subject to the normal depreciation of the property while being used by the advancee. By the same token, this protects the ambitious child who has, by judicious use of the property, and risk of investment, caused the property to be increased in value.⁴⁶

While the rule and the reason therefor seem fairly logical and uncomplicated, the courts have been plagued with difficulty in applying the rule to particular situations. For example, where the parent makes a parol gift of land to the child, and many years later deeds the land to the child, the court must determine whether the land should be valued as of the date the child enters into possession of the property, or the date of the conveyance. The majority of courts hold that the land is valued at the date of possession,⁴⁷ others saying that the date of conveyance is the proper date.⁴⁸ The Virginia court, in expressing the theory of the majority view, made the following statement:

⁴⁴ *Payne v. Payne*, 128 Va. 33, 104 S.E. 712 (1920); *Kyle v. Conrad*, 25 W. Va. 760 (1885).

⁴⁵ *Gaylord v. Hope Natural Gas Co.*, 122 W. Va. 205, 8 S.E.2d 189 (1940).

⁴⁶ *Kyle v. Conrad*, 25 W. Va. 760 (1885); *Purveyor v. Cabell*, 65 Va. (24 Gratt.) 260 (1874).

⁴⁷ *Ingram v. Ingram*, 130 Va. 329, 107 S.E. 653 (1921).

⁴⁸ *Edwards v. Livesay*, 203 Ky. 53, 261 S.W. 839 (1924).

"Confessedly, the parol gift communicated no title, and was revocable at any time. Nevertheless, the moment the deed was executed the title passed, and the advancement became complete and irrevocable, going back by relation to the date of the parol gift, when the possession of the land and the enjoyment of its rents and profits began. The deed was in law but an affirmation and ratification of the parol gift, without change in the control and dominion of the land. . . ."⁴⁹

It would seem that from this reasoning and from the reasoning of the *Chinn* case,⁵⁰ that the same analysis would be applied where the improvements of the child withdrew the land from the application of the statute of frauds to the transaction.

There would appear to be one logical extension of the general rule, this in the case of an insurance policy on the life of the advancer, with the advancee being named as the beneficiary. Since the beneficiary does not come into possession of and enjoyment of the proceeds of the policy until the death of the insured, he should, and it is generally so held, account for the amount received from the policy, and not the value as of the date he received the policy.⁵¹

Statutes in some jurisdictions specifically allow the parties to agree upon the value to be placed on the advanced property,⁵² while states having no statutory provision reach the same result by judicial decision. West Virginia, by the latter method, has said that where the father and child have agreed as to the value of the property ". . . this irrevocably establishes its value as an advancement. . . ."⁵³

The one remaining facet of this section of the doctrine concerns the interest that the advancee is required to pay on his accounting to the estate. The rule is well settled that the advancee is not compelled to pay interest before the death of the advancer.⁵⁴ One West Virginia case expresses the reasoning for the rule to be that the purpose of an advancement is to establish the child in his

⁴⁹ *Ingram v. Ingram*, *supra* note 47.

⁵⁰ *Chinn v. Murray*, 45 Va. (4 Gratt.) 348 (1848).

⁵¹ *Cazassa v. Cazassa*, 92 Tenn. 573, 22 S.W. 560 (1893); *Contra*, *Rickenbacker v. Zimmerman*, 10 S.C. 110 (1877).

⁵² N.Y. DECEDENT'S ESTATE LAW § 85 (1939).

⁵³ *Ingram v. Ingram*, *supra* note 7.

⁵⁴ *Ratcliff v. Meade*, 184 Va. 328, 35 S.E.2d 114, (1935); *Kyle v. Conrad*, 25 W. Va. 760 (1885).

occupation for life, at the most opportune age, and two children have been equally advanced if this is done, and the older one should not be penalized by interest payments because of his age. However, the courts hold that in order to insure equality as between those entitled to share in the distribution of the estate, interest should be charged on an advancement from the death of the donor.⁵⁵

C. Other Types of Transactions

Not all transactions between a parent and child constitute advancements. There are various situations which enable the transaction to be distinguished from an advancement.

A sale, with adequate consideration paid to the parent by the child, does not constitute an advancement to the child.⁵⁶ This problem arises most often where land is conveyed from parent to child by deed, with a recital in the deed of consideration paid and receipt acknowledged. This recital is prima facie true, although it is open to contradiction by satisfactory proof, and must be accepted as true until thus contradicted.⁵⁷ However, where the deed recites a pecuniary consideration, it may also be shown by parol evidence that there was also the consideration of an advancement.⁵⁸ Thus it is possible to show at least a partial advancement where it can be established that the consideration actually paid was not an adequate and full consideration; but in this instance the consideration actually paid must be deducted from the value of the land as of the date of the deed.⁵⁹

It is possible to have a conveyance by a father to one of his children made for the purpose of satisfying a debt owing to the child by the parent. If, in this situation, a father conveys property to his child, even though the value of the property is more than equal the amount of the debt, the conveyance will be presumed to be in satisfaction of the debt, if there are no circumstances to prove a contrary intention.⁶⁰ This situation, however, would seem to be

⁵⁵ *In re Boggs' Estate*, 135 W. Va. 288, 63 S.E.2d 497 (1951); *Kyle v. Conrad*, *supra* note 54.

⁵⁶ *Osborne v. Richmond*, 131 Va. 261, 108 S.E. 560 (1921).

⁵⁷ *Ibid.*

⁵⁸ 2 DEVLIN, DEEDS 829 (3d ed. 1911).

⁵⁹ *Harrelson v. Gooden*, 229 N.C. 654, 50 S.E.2d 901 (1948); *Osborne v. Richmond*, 131 Va. 261, 108 S.E. 560 (1921).

⁶⁰ *Kelly v. Kelly*, 27 Va. (6 Rand.) 176 (1828).

open to the rationale applied to the cases that are partially a sale of land and partially an advancement, as previously discussed.

The situation can also be reversed, *e.g.*, where the father, during his lifetime, has loaned money to one of his children. This creates an enforceable claim by the estate of the intestate against the child for the amount of the debt, while an advancement creates no such claim, and is voluntary on the part of the advancee for the purpose of further sharing in the estate.⁶¹ The West Virginia court has stated this more concisely in the case of *In re Boggs' Estate*⁶² where it was held that ". . . an indebtedness due an estate by an heir or distributee must be paid in any event, but an advancement embraces no obligation to repay." The Pennsylvania court has perhaps made the most lucid distinction between the two concepts, in the following language:

"A debt is but a set-off in equity against the share of the distributee. It must therefore be one which is subsisting and recoverable at the time of the father's death, in order to constitute an available defalcation of the son's distributive share. An advancement is different, and is not affected by lapse of time of limitation. It does not operate by way of set-off or defalcation, but by a legal abstraction of that much from the child's share in the father's lifetime; therefore leaving the share that much less at his death. Operating thus by anticipation, it is not controlled by the same defences, such as infancy, limitations, etc., as prevent the recovery of debts."⁶³

It is entirely within the realm of possibilities to have a complete irrevocable gift from the parent to the child that does not constitute an advancement. A gift may be an advancement, or it may be an absolute gift, a gift and nothing more. "All advancements are gifts, but all gifts are not advancements."⁶⁴ An advancement differs from a gift in that the former must be accounted for on the settlement of the advancer's estate while it is not necessary to account for the latter.⁶⁵

⁶¹ *Waldron v. Taylor*, 52 W. Va. 284, 45 S.E. 336 (1903).

⁶² *Ibid.*

⁶³ *Hughes' Appeal*, 57 Pa. 179 (1868).

⁶⁴ *Hanssen v. Karbe*, 234 Mo. App. 663, 115 S.W.2d 109 (1938).

⁶⁵ *Waldron v. Taylor*, *supra* note 61.

VI. PRESUMPTIONS AND FUNCTION THEREOF

The distinction made between a gift that is an advancement and the gift that is not introduces the next area of discussion, the relationship between the doctrine of advancements and certain presumptions that have arisen in this field. As has been previously stated, the intent of the transferor determines whether a conveyance is an advancement or a gift. Often property is transferred by a parent to a child without any outward manifestations of intent on the part of the former. Succinctly stated by the West Virginia court in *Prichard v. Prichard*,⁶⁶ where there is no intent shown “. . . the rule is well established that such payments [by a father to a child] are prima facie advancements, and will be so treated, unless the presumption in that regard is overcome. . . .”⁶⁷ This is a presumption based upon (1) the supposed intention and desire of the parent to correct as far as practical inequalities in his estate; and (2) the idea the natural affection of a parent is as strong for one child as it is for another.⁶⁸

As is the usual situation within the doctrine of advancements, the problems arise most frequently in the area of real property transactions, for in this situation is the absence of evidence as to the intention of the parties most prevalent.

The most commonplace transaction which gives rise to the application of the presumption of an advancement is the unexplained gift from parent *directly* to the child. Very early in the history of this phase of the law is a statement by the Virginia court as to the effect that would be given to such an unexplained gift. That court states “. . . that a gift in the lifetime of the intestate, unexplained, is only a *presumption* in favor of an advancement, and makes only a prima facie case, which, with the legal presumption, may be rebutted by evidence.”⁶⁹ The court has further substantiated its position by applying the doctrine of advancements to the situation wherein there was a supposed satisfaction of a legacy. The Virginia court in this instance said that neither law nor good sense admits the supposition that a parent would make a double provision for the same object, hence, if a parent gave a legacy to a

⁶⁶ 91 W. Va. 398, 113 S.E. 256 (1922).

⁶⁷ See also, *Hedrick v. Harper*, 135 W. Va. 47, 62 S.E.2d 265 (1950), where the court stated that a substantial sum of money given by a father to his daughter, unexplained, creates a rebuttable presumption that such a gift was intended as an advancement.

⁶⁸ *Rowe v. Rowe*, 114 Va. 816, 130 S.E. 771 (1925).

⁶⁹ *Watkins v. Young*, 72 Va. (31 Gratt.) 84 (1878).

child and afterwards made a provision for the same child by way of advancement, the common law presumption of an advancement would be applicable to the legacy.⁷⁰ West Virginia courts have said in essence that it is an unquestioned rule of descent and distribution that a gift of property from a parent to a child is presumed to be an advancement.⁷¹

The same problem arises where a parent furnishes the consideration for the purchase of property by one of his children from a third party. Usually, when one person pays for the property that is held in another's name the latter is said to hold the property in trust for the benefit of the one who paid the purchase price.⁷² However, this is not the case when the parties to the transaction have the relationship of parent-child, and here the transaction is presumed to be an advancement, on the basis that the parent makes the conveyance in consideration of obligation to his family.⁷³ The court in *Young v. Holland*⁷⁴ quoted with the following statement from the case of *Dyer v. Dyer*.⁷⁵

"As to purchases made in the names of children, or of persons equally favored, it may be laid down as a general rule that, where a purchase is made by a parent in the name of a child, there will be prima facie no resulting trust for the parent, but on the contrary, a presumption arises that an advancement was intended."

A third area which gives rise to a presumption in favor of advancements is the situation where a father makes an unexplained gift, either of money or property, to the spouse of his child. This most normally occurs when there is a conveyance made by the father to the husband of his daughter. The earliest recognition of this problem and its solution in West Virginia came in 1885.⁷⁶ In determining the issue of presumptions in the field of advancements, the court looked to the construction of a Kentucky statute (at that time identical with the applicable West Virginia statute) and quoted

⁷⁰ *Harrison v. Harrison*, 171 Va. 224, 198 S.E. 902 (1938).

⁷¹ *In re Boggs' Estate*, 135 W. Va. 288, 63 S.E.2d 797 (1951); *Hedrick v. Harper*, 135 W. Va. 47, 62 S.E.2d 265 (1950); *Gaylord v. Hope Natural Gas Co.*, 122 W. Va. 205, 8 S.E.2d 189 (1940).

⁷² *Bank of United States v. Carrington*, 34 Va. (7 Leigh) 566 (1836).

⁷³ *Clark v. Spain*, 119 Va. 58, 89 S.E. 130 (1916); *Young v. Holland*, 117 Va. 433, 84 S.E. 687 (1915).

⁷⁴ 117 Va. 433, 84 S.E. 637 (1915).

⁷⁵ *W. & T. Eq. Cas.* 266.

⁷⁶ *Kyle v. Conrad*, 25 W. Va. 760 (1885).

at length from the Kentucky case of *Barbour v. Taylor's Heirs*,⁷⁷ arriving at the following conclusion:

"A settlement on a son for life, remainder to his wife and then to his children, should be considered as an advancement to the son to the whole extent of the value of the entire estate. . . . These doctrines . . . virtually recognize as a controlling principle the intestate *father's intention*; and therefore virtually decide that whatever he intended as an advancement, and would have so treated, at his death should generally, if not invariable, be considered without regard to the mode of making or securing the actual enjoyment of it, concerning all which he should be the sole arbiter. And therefore there could be no doubt that, if a father should vest in a stranger the title to property, in trust for a daughter, the estate thus intended for her by such a provision should generally be deemed an advancement. . . ."⁷⁸

The court concluded that ". . . the intention of the donor to advance his daughter will be presumed from the fact that he conveys to the husband upon the sole consideration of the existence of the marriage-relation between them. . . ."⁷⁹

This same theory has been used to declare that the payment of the debts of his son-in-law constitutes an advancement by a father to his daughter,⁸⁰ and a deed of land to the son-in-law, wherein no mention was made of the daughter, also raised the presumption of an advancement.⁸¹ The conveyance of land made without mention of consideration, or for merely nominal consideration, will raise the presumption of an advancement,⁸² and generally, where the recited consideration is "love and affection," either for a child or grandchild of the advancer, the conveyance will be presumed to be an advancement to the child.⁸³

VII. APPLICATION TO PARTIAL INTESTACY

The most difficult problem created by the statute relating to advancements is the segment which states that the law will apply to

⁷⁷ 39 Ky. (9 Dana) 84 (1839).

⁷⁸ *Id.* at 86.

⁷⁹ *Ibid.*

⁸⁰ *McDearman v. Hodnett*, 83 Va. 281, 2 S.E. 643 (1887).

⁸¹ *Bruce v. Slemp*, 82 Va. 352, 4 S.E. 692 (1887).

⁸² *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S.E. 523 (1918).

⁸³ *Kyle v. Conrad*, 25 W. Va. 760 (1885).

the estate of any “. . . person dying intestate as to his estate, or any part thereof . . .” and to any descendant or collateral relative of such person who has “. . . received from such intestate in his lifetime, or under his will . . .” any property, by way of advancement.⁸⁴

The partial intestacy problem arose in the Virginia Code of 1849, when the common law theory of advancements was broadened by legislative enactment, and subsequently became a part of the West Virginia law.⁸⁵ Most jurisdictions hold that the concept of advancements does not apply to the situation where there is a partial intestacy. This result was reached by holding that the purpose of the doctrine is to effectuate a presumed intent of a parent that his children should share equally, *but*, where a parent disposes of his estate by will his directions are given, and if a child receives more than his proportionate share, the parent did not intend for them to share equally.⁸⁶ The English cases decided prior to the Administration of Estates Act of 1925 also reached this conclusion, but used as the basis for this the reasoning that since there was a will, the testator did not die intestate.⁸⁷ Since 1925, English courts have applied the doctrine to cases wherein there is only a partial intestacy on the part of the parent.

The Virginia court entered into a learned and complete discussion of advancements and partial intestacy in the case of *Wilson v. Miller*.⁸⁸ Although the court was not deciding an issue directly in point the statements, reasoning and logic of the court are applicable to the question of partial intestacy. In this case the testator had four children, and had made considerable advancements to two of them. He died, leaving a will devising the estate to the four in almost equal segments. After his death, a posthumous child was born (pretermitted by the will). A statute provided that this child would be entitled to such “portion of the father’s estate” as if he “had died intestate,” and the devisees were to contribute ratably from their legacies and devises toward this share. The issue presented to the court was whether or not the doctrine of “hotchpot” was applicable to force the children who had received advancements to account for them in determining the “intestate” share of the

⁸⁴ W. VA. CODE, ch. 42, art. 4 § 1 (Michie 1955). (Emphasis added.)

⁸⁵ *Payne v. Payne*, 128 Va. 33, 104 S.E. 712 (1920).

⁸⁶ Elder, *Advancements*, 52 MICH. L. REV. 231, 239 (1953).

⁸⁷ *Walton v. Walton*, 33 Eng. Rep. 543 (1807).

⁸⁸ 1 P. & H. 353 (Va. 1855).

pretermitted child, and in deciding this the court found it necessary to determine whether the doctrine of advancements was applicable to situations other than complete intestacy on the part of the parent. On the one hand it was contended that the after-born child had the rights to participate in the advancements made to any legatee or devisee in the lifetime of the father, to the same extent as if he had died wholly intestate. On the other hand it was contended that the pretermitted child was entitled only to a full share of the estate of which the father died seized. The court thoroughly considered these problems as raised by counsel, and in reaching the solution that the doctrine of advancements did not apply to this set of facts, made statements pertinent to the issue here under discussion:

“ . . . [A] plenary testamentary power was given to every person deemed capable of exercising it, and when exercised according to the prescribed forms and solemnities of the law, no matter how capriciously or unjustly, no matter who were the objects of testamentary bounty, the act was valid—*voluntas stat pro lege*—but if any one chose not to exercise this testamentary power, and to die intestate, the law stepped in, and by the statute of descents and distributions disposed of his estate, real and personal; and in doing so, it adopted as its rule and guide the principle of equality.

“To produce this equality there was incorporated in the statute the provision requiring advancements to be brought in. . . .”⁸⁹

The opinion also noted that “it cannot seriously be gainsayed or questioned that the doctrine of advancements was inapplicable to a case of partial intestacy. . . .”⁹⁰ It is important to note that the court made these statements in 1855, and although the fact situation of the case arose prior to 1849, the court, at the time it handed down its opinion, was fully appraised of the statute passed in 1849, which made the doctrine of advancements applicable to partial intestacy.

Since the time of the passage of the statute, the Virginia court has construed and applied the doctrine twice, both cases being

⁸⁹ *Id.* at 388.

⁹⁰ *Id.* at 390.

decided on the same day, effectively summarizing the state law on the subject. The first of these, *Payne v. Payne*,⁹¹ involved a situation where the father had made disproportionate advancements to certain of his children during his lifetime, and disposed of the larger items of his estate by means of a holographic will, saying nothing in his will about the residue of his estate. The court applied the statute, and found that all descendants who desired to share in the residue of the estate had to account for their advancements. The court, commenting on the statute, made the following statement:

“ . . . The statute does not assume to interfere with the freedom of the ancestor to prefer one or more of his descendants in the distribution of his estate, but applies only where, having distributed a part of his estate to them, he has left part of it undisposed of, to be distributed under the statute of descents and distributions. In such case the statute, in its endeavor to accomplish that equality which is equity, equalizes the shares of those descendants who claim to share in the distribution of the property which has been undisposed of, by requiring that those who have received advancements shall first have their value taken into account . . . ”⁹²

This appears to be a very interesting justification of the rationale of equality and intent, a justification ever more in evidence in the *Poff case*⁹³ decided by the court later in the day wherein the testator clearly stated that he was giving certain of his property to his children, and desired the remainder to go by the laws of intestacy. Here also, the court, for the avowed purpose of the equality of descent and distribution, said that the property so given under the will was to be treated as an advancement.

There is one Virginia case, not referred to in either the *Payne* case or the *Poff case* which raises certain questions as to those decisions. In this earlier case, *Bienler v. Bienler*,⁹⁴ the testator disposed of certain of his property by will, and directed that the remainder be disposed of in accordance with the laws of intestate succession. The court refused to consider the specific disposition as an advancement, and used an extremely logical reason for this, saying that “ . . . in a case like this, where the testator has left a will, no

⁹¹ 128 Va. 33, 104 S.E. 712 (1920).

⁹² *Id.* at 40, 104 S.E. at 714.

⁹³ *Poff v. Poff*, 128 Va. 62, 104 S.E. 719 (1920).

⁹⁴ 87 Va. 300, 12 S.E. 713 (1891).

matter what may be the rule in other cases, no presumption of an intention to advance can arise from the mere circumstance of a partial intestacy. . . ."⁹⁵ The very purpose of the will the court said was to correct inequalities, insofar as the testator desired so to do.

The views presented by those courts which refuse to apply the doctrine to situations other than complete intestacy present as a basis for this view somewhat the same idea as was presented by the Virginia court in applying the doctrine to partial intestacy. The Iowa court⁹⁶ expressed the majority view by stating that no property given as an advancement could be taken into account in the distribution of an estate where the parent leaves a will, even though the will did not dispose of all of his property, and stated that:

" . . . The reason for this rule is obvious. If it were otherwise, it would be impossible for one to make a will which, in cases of partial intestacy, would give to one heir more than to another. The testator is conclusively presumed to have considered the advancements and the bequests made in the will collectively, and to have made distribution as he intended to make it. He need not treat his heirs or devisees as standing on an equal footing, and may give to one more than to another, or may equalize the matter, as he sees fit in the will. The doctrine of advancements rests upon the presumed desire of an ancestor to equalize his estate among his heirs. When he makes his will, he expresses his intention in this respect, and his desires should be followed. . . ."⁹⁷

It would appear that from the rationale and reasoning of the common law concept of the doctrine of advancements, and from the broad social policy of equality among the members of the family upon which the very foundation of the doctrine is based, that the intent of the parent is more accurately and reasonably effectuated by following the directions given by the testator in his will to the

⁹⁵ *Id.* at 303, 12 S.E. at 715.

⁹⁶ *Gilmore v. Jenkins*, 129 Iowa 686, 106 N.W. 193 (1906).

⁹⁷ *Id.* at 689, 106 N.W. at 194.

exclusion of the application of advancements to the situation wherein there is a partial intestacy.⁹⁸

CONCLUSIONS

The doctrine of advancements, unknown originally at common law, is a creature of statute, both in England and in the United States, the statutes of the latter being patterned in most instances after the former. The first advancement statute was passed as a part of the English Statute of Distributions in 1670⁹⁹

The original conception of the doctrine made it applicable to parent and child, but statutes today have enlarged and broadened this doctrine to include, in West Virginia and Virginia, both descendants and collateral relatives. The Model Probate Code¹⁰⁰ has suggested that the doctrine be applied to any person "who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate."

The social policy behind the doctrine is equality among the children of the intestate in the absence of a statement by the parent of inequality in the form of a will. West Virginia has broadened this policy by making the doctrine applicable to situations wherein there is a partial intestacy. Since this doctrine was originally applicable only to children, it would seem that an extension by the courts and legislatures to person other than children is contrary to the social policies evidenced by the doctrine at its inception.

In most jurisdictions the courts have, by judicial decision, created a presumption that any inter vivos transfer of a substantial amount of money or property between the parent and child is a prima facie advancement, on the basis that the natural affection of a parent towards his children is equal. By this presumption, all children share equally in the estate of the intestate parent.

⁹⁸ It is open to question whether the West Virginia court would apply the doctrine of advancements in the following situations: (1) The will is invalid as to certain portions and for this reason a part of the estate passes by intestate succession; (2) The testator directs that a portion of his property is to pass by the laws of intestacy; and (3) The testator directs that his property is to go to those persons who would take under the laws of descent and distribution. The logical result would seem to be that the first two would constitute partial intestacy under the terms of the statute, while the third would be only extrinsic evidence as to the distribution of the estate.

⁹⁹ 22 & 23 Car. 2, ch. 10 (1670).

¹⁰⁰ MODEL PROBATE CODE § 29. See, SYMES & BASYE, PROBLEMS IN PROBATE LAW 65-66 (1949).

However, the intent of the advancer in this situation is the determining feature, and this intent may be expressed, either prior or subsequent to the act, or implied from the circumstances surrounding the act, and may be shown by extrinsic evidence.

It is felt that the doctrine of advancements as originally conceived had merit, and the abolishment today of all legislation in relation to the doctrine would not lessen the misunderstanding among heirs of persons dying intestate. However, the danger of these quarrels could be decreased by a limitation on the application of the doctrine to the children and grandchildren of the intestate, and a requirement that the doctrine be inapplicable to any situation other than *complete* intestacy.